No. 14,585

IN THE

United States Court of Appeals

For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Appellants,

vs.

RICHARD TAITANO and HARRY L. MANGERICH,
Appellees.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANTS' REPLY BRIEF.

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AUG 3 1955
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APPELLANTS' REPLY BRIEF.

JURISDICTIONAL STATEMENT.

Jurisdiction is amply set forth in the opening and answer briefs, despite an inaccurate statement in appellees' brief concerning the jurisdiction of the District Court of Guam.

STATEMENT OF THE CASE.

Appellants abide by their statement of the case contained in the opening brief. Appellees improperly attempt to argue in their statement of the case and to introduce irrelevant matter. The obvious conclu-

sion to be drawn is that appellees seek in their statement to mislead the Court.

ISSUES HEREIN PRESENTED.

Appellees have obviously failed to discuss certain of the points raised by appellants. Appellants believe that no new issues have been raised by the answer brief though appellees have attempted to re-cast the issues. As well as we can interpret their rather disorganized brief, we feel that they have narrowed the points for consideration and in effect conceded major points to appellants.

SUMMARY OF ARGUMENT.

Appellants contend that the *Laguana* case does not apply to or govern this case; that even if correctly interpreted by appellees it is neither as broad as they contend, nor has it decided many of the questions herein in issue. These points were not raised in the *Laguana* case, and even if considered, being unnecessary to the decision of that case, they are not decisive of the issues raised here.

Substantially, the appellees insist that the *Laguana* case had decided all possible issues; that there cannot be any question as to appellees' status or authority; that actually no constitutional issues are raised; that the unknown text of an unpublished statute is clear, definite, certain and presents no ambiguities.

Appellees persist in their fundamental misconception that we have attacked the constitutionality of the Organic Act of Guam rather than facing the fact that we are attacking their interpretation of the statute, which interpretation contains the constitutional vices we complain of. There is a difference. If, and we do not so concede, their interpretation were the only possible one, then the invalidity of the statute might be in question. However, we contend, whether appellees wish to admit the fact or not, that their interpretation must fall due to the constitutional weaknesses therein contained, and that properly construed, the statute is valid and, deleting the defects attempted to be engrafted thereon by appellees, it is both clear and practicable.

Appellees have discussed at length the equity aspects raised by appellants. This discussion serves only to emphasize their confusion as to the issues which must be resolved. Actually, this portion of their brief is of little help. Argument must be upon the same set of issues. Here, appellees are discussing questions of their own making, and they evade the issues presented by appellants. Appellees demonstrate the constitutional infirmities of their position by their frequent reliance upon disconnected sections of Title 26 USCA, without explaining why the remainder is not applicable in Guam.

Lastly, appellees are forbidden by local statutes to represent private individuals, and if the Government of Guam is an interested party to this action, it should have entered an appearance.

ARGUMENT.

APPELLANTS' REPLY TO APPELLEES' POINT I.

Appellees misconstrue the *Laguana* case and fail to confine it to its proper sphere. Insofar as that case goes, the decision can still be entirely correct and yet not govern a single point raised in this case. Appellants contend that though the *Laguana* case was correct upon its factual situation, it is not in point here, and it is not the ruling case as is asserted by appellees.

The *Laguana* case did not raise many of the issues herein raised, and as to those issues, it cannot govern, even if discussed in its dicta. A standard canon of construction is that only the points necessary to the decision are settled. All others, though discussed, are dicta. *Laguana* was held to have failed to state a claim upon which relief could be granted. Having conceded that a tax was owed to someone, and that Ansell was the duly constituted officer to receive taxes for the Government of Guam, the Court had little choice except to find as it did. The numerous points raised in this action were neither raised in that case nor considered. Therefore, as to substantially all of the issues herein, *Laguana's* case is not ruling.

Further, basic facts stipulated to in the *Laguana* case are here in controversy. Can *Laguana's* stipulation preclude others not privy to him? We believe not. A main point blithely assumed by our adversaries is that it has been conclusively determined that they are the proper collectors, yet this is a fact in issue. Actually, a major question is, are there any proper officers of Guam duly authorized to collect such a tax?

Conceding for argument's sake that the *Laguana* case is sound, it cannot solve the various constitutional questions raised by appellants as set forth in appellants' Points No. II, IV, VII (b), (c), (d), and (e). Appellees, basing their entire position on one case, twist it by tortuous reasoning to constitute an entire system of jurisprudence. This they cannot do.

Appellants assert that substantially all of appellees' argument under Point I of their brief consists of extraneous matter used to confuse the issues so that the fundamental questions raised are obscured and may pass unnoticed.

We contend that the *Laguana* case must be confined to its own set of facts, does not govern the instant case and is not in point.

APPELLANTS' REPLY TO APPELLEES' POINT II.

Again, appellees rely wholely upon the *Laguana* case. Appellees deliberately misconstrue the contentions of appellants. We contend that appellees have no authority and that the District Court of Guam was in error in holding that appellees do have such authority. It is a fact not properly the subject of judicial knowledge, and no competent evidence was before the Court.

The untenable position of appellees is amply demonstrated by the introduction of legislation requested by the Governor of Guam in the Third Guam Legislature for the purpose of creating authority for appellees to collect the alleged tax; to create the office of Commis-

sioner of Revenue and Taxation; and to create a territorial income tax—all being urgency measures. (See letter of the Executive Secretary of the Guam Legislature with enclosures, Appendix.) It is a fact of major interest that the Guam Legislature failed to enact these measures. We contend that at least error is clearly confessed by implication.

We may dismiss without comment appellees' argument as to what might have, or could be, done. Taxation must stand upon actual facts, not possibilities. The discussion of whether Section 31 is a local statute or otherwise serves no purpose. The Congress is perfectly capable of speaking clearly, and since that section is part of a law of the United States, and since Congress did not differentiate it, we know of no rule of construction which will enable anyone to lift a section out of context and thus create a different type of statute. Laws are not amended with a scissors.

Rather, should not the text stand on its own plain words. We contend that it is clear, workable and does not support the erroneous position of appellees.

APPELLANTS' REPLY TO APPELLEES' POINT III.

A. *Laguana,* like unto the Phoenix, rises again. Standing upon that durable case, appellees assert that, it being correct, we cannot raise any constitutional question; all are decided; and they do not exist. Even if Section 31 does create, or attempt to create, as interpreted by appellees, a separate territorial tax, the

constitutional points do exist and not having been decided, are not concluded or precluded by *Laguana.*

B. Appellees deliberately attempt to confuse our position on the delegation of legislative power. Also, by discussing what Congress might do, but did not do, they attempt to obscure and becloud the issue, not meet it.

We still assert that the Commissioner of Internal Revenue is authorized by law to construe and interpret only statutes that he has the duty to enforce. So, in I.T. 4046 it is clear that if he had authority to construe the Organic Act of Guam, he has also the duty to enforce the tax therein determined by him to exist; that to so construe it as to delegate enforcement duties and authorities to unauthorized persons is the abandonment of his statutory duties. And if the Commissioner of Internal Revenue has not the duty to enforce the law, he likewise lacks the authority to construe it.

We state that the Commissioner has attempted, by construction, to delegate his duties to the Government of Guam and, by the same administrative construction, to read into a statute a delegation of the legislative function: that is, the power to amend. We further state that the Governor of Guam and these appellees have usurped such powers, basing their alleged authority upon the unauthorized interpretation of the Commissioner of Internal Revenue.

C. Appellees profess to be unable to find our indefiniteness, uncertainty, vagueness, or ambiguity in Section 31 of the Organic Act, as interpreted by themselves.

Is not the test of a statute wherein words have been substituted, deleted, added, certain sections amended, some dropped, others unpublished or unknown; and still others, despite changes, still not available to anyone, lacking in the very attributes claimed by appellees to exist? If, as appellees contend, their altered statute is clear, plain and unambiguous, why do they refuse to make known its text? Not even by requests for admissions in the case of *Wilson et al. v. Kennedy et al.*, now on appeal, could that information be obtained. Though appellees concede they have made changes, they refuse to make available the text, or to see the very vices they concede to exist. We conclude therefore that appellees have conceded our position but still refuse to admit such.

D. This sub-point is replied to simply. We do not challenge the constitutionality of Section 31, merely the interpretation placed upon it by appellees.

APPELLANTS' REPLY TO APPELLEES' POINT IV.

An intelligent reply is difficult to make due to the fact that appellees shift their asserted position as suits their convenience; at one time discussing a Federal tax, another a territorial tax, then a Federal law of local application, and, of course, portions of the Guam Code. However, a few misconceptions stand out.

A. Section 7421 (a) T 26 USC refers to United States taxes—no others. How far can legislation by implication be carried? Surely, not as far as appellees contend. Appellees fail to substantiate their position.

B. Appellees entertain us with a discourse on equity, and attempt to sustain the proposition that we are not entitled to equitable relief and that the District Court did not err. The record speaks for itself. Appellees fail to see that under the facts alleged, and not refuted, extraordinary circumstances exist; namely, *total ruin.* Is this mere hardship? Are not unwarranted fraud penalties demonstrative of capriciousness and arbitrary action?

C. This sub-point is covered briefly. Appellees assert that adequate remedies exist, yet admit that they do not know what they are. Wherein is the adequacy? What procedures exist, where can they be found, and by whom are they provided?

D. Appellees herein hardly should be dignified with a reply; however, appellants replying on their opening brief, nevertheless assert that as to this specification appellees are in error. One comment, however, should be made concerning the allegation of innuendo to be found on page 60 of the answer brief. The record is clear, TR 25, and if any other inference can be drawn from the facts, it is acceptable. The record tells the story.

APPELLANTS' REPLY TO APPELLEES' POINT V.

Section 7422 (a) of the Internal Revenue Code of the United States applies only to taxes collected by the United States. Appellees assert that our rights are barred because no claim for a refund was filed pursuant to that section. They construe their illegal

acts to be the collecting of a tax. We assert these acts are not tax collections. We ask to whom does one go to seek a refund when the very men who committed the tort assert the right to pass upon the legality of their own acts. We are in Court trying to determine the existence of any procedures, what they are, and who is entitled to administer them. We contend that an adequate remedy must be such a remedy as may be enforced in a Federal Court. Could any United States District Court determine the adequacy of the asserted remedies? Or even adjudicate any question arising under this unpublished statute? Yet, we are in court under the Constitution and laws of the United States.

APPELLANTS' REPLY TO APPELLEES' POINT VI.

Appellees insist that though an appeal lies from the denial of a temporary injunction, yet nothing prevents the trial Court from immediately after an appeal is taken, dismissing the complaint and rendering the appeal vain.

Appellees cite *ex parte National Enameling and Stamping Company* (1906), 201 U.S. 156, 26 S.Ct. 404, 50 L. ed. 707, in support of their position. This case decided prior to the XVI amendment, is one involving patent law.

To appellants, it appears that this matter being equitable in nature, that case must be applied in an equitable manner, due consideration being given to the facts of the instant case. Further, the rule cited

appears to have certain exceptions in instances where either the entire record must necessarily be considered by the appellate Court upon an appeal from a denial of a preliminary injunction or when to take further action in the case, before the determination of the appeal, would have the effect of rendering the appeal meaningless.

The following cases support this contention:

Goldwyn Pictures et al. v. Howells Sales Co., 287 F. 100:

> ". . . On such appeals our power to review cannot be 'hampered or restricted by any prior ruling of the trial court, * * * though made in an order from which a direct appeal is not allowed, especially where such ruling relates to the jurisdiction of the court.' Lake Street, etc., Co. v. Farmers', etc., Co., 77 Fed. 769, 23 C.C.A. 448. Such appeal brings up the whole case as it is, and we may 'consider and determine the case on its merits, and thereupon render or direct a final decree dismissing the bill.' Smith v. Vulcan Iron Works, 165 U.S. 518, 17 Sup. Ct. 407, 41 L.Ed. 810."

Commercial National Bank in Shreveport v. Parsons, 144 F.2d 231, 240:

> ". . . An appeal in equity, unless expressly restricted, brings up both law and fact. It is a proceeding in continuation of the original suit. The entire cause is removed to the appellate court and tried de novo on the record and evidence in the lower court. Findings of fact may not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to

judge of the credibility of the witnesses; but there is nothing in our decision that contravenes the provisions of this rule, or of any rule, statute, or legal principle that has been called to our attention."

Smith v. Vulcan Iron Works, 165 U.S. 518, 41 L. ed. 810:

> ". . . The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

It is our belief that the entire case of necessity was transferred to the Court of Appeals. In any event, under the facts in this case and considering the element of time, is not the hurried dismissal by the District Court an abuse of its discretion in effect determining the matter prior to the action of the appellate Court—this action is largely equitable, we think, that the flexibility of equity and its broad principles should govern, but did not.

APPELLANTS' REPLY TO APPELLEES' POINT VII.

Appellants stand upon the argument presented in the opening brief. We wish to point out, however, that pensions to veterans under Title 38 USCA are now denominated compensation.

APPELLANTS' REPLY TO APPELLEES' POINT VIII.

In our opening brief we alleged error on the part of the District Court in permitting persons not members of the bar of the District Court to appear on behalf of defendants. In appellees' reply brief, no denial is made of that assertion. These individuals assert their right to appear on behalf of the Government of Guam although they never assert that they are members of the bar of the Court. Neither has the Government of Guam shown sufficient interest in this and similar litigation to interplead; yet these persons insist they appear to protect its interests. Is it not strange that though there are members on the staff of the Attorney General of the Government of Guam who are members of the bar of the District Court, none of them has appeared in any hearing of the tax litigation presently pending?

CONCLUSION.

Appellants, therefore, claim that appellees having conceded major portions of our contention, that error has been demonstrated, the District Court of Guam

should be reversed, an injunction issue, and the appellees required to answer the complaint on its merits.

Dated, Agana, unincorporated territory of Guam, August 17, 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

E. R. CRAIN,

Pro Se.

(Appendix Follows.)

Appendix.

Appendix

Third Guam Legislature
Territory of Guam
(Seal)
F. B. Leon Guerrero, Speaker
B. J. Bordallo, Vice-Speaker
A. S. N. Duenas, Legislative Secretary
Rev. R. C. Flores, Chaplain
John A. Bohn, Counsel
April 13, 1955

Mr. E. R. Crain
Attorney-at-Law
Agana, Guam

Dear Mr. Crain:

Copies of Bills No. 28, 46, 57, and 78, Third Guam Legislature, are herewith forwarded in compliance with your letter of April 7th. All four bills were submitted to the Legislature by the Governor.

Very truly yours,
/s/ Maria C. Duenas,
Maria C. Duenas,
Executive Secretary.

Enclosures (4)

* * * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 28 Introduced by.....
Committee on Finance & Taxation, by request

An Act to add Chapter 10, Title XX, to the Government Code of Guam, for the purpose of enabling other states, territories, and possessions of the United States, and their political subdivisions, to maintain suits in the District Court of Guam to recover taxes on a reciprocal basis, and for other purposes.

Be It Enacted by the People of the Territory of Guam:

Section 1. There is hereby added to Title XX, of the Government Code of Guam a new Chapter 10 to read as follows:

* * * * * * *

Section 2. This Act is urgency measure and shall take effect upon its approval by the Governor.

* * * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 46 Introduced by.....
Committee on Finance and Taxation, by request.

An Act to clarify and add various enforcement provisions to the Business Privilege Tax Law, Chapter 6, Title XX, of the Government Code, by adding Sections 19527 and 19528, by repealing Subsection 19501.0206 of Section 19501 and adding Section 19529,

by repealing Subsection 19501.0213 of Section 19501 and adding Section 19530, by amending Subsection 19566.01 of Section 19566, by adding Subsection 19593.03 to Section 19593, by repealing present Subsection 19501.05 of Section 19501 and adding a new Subsection 19501.05 to Section 19501, by repealing present Section 19503 and adding a new Section 19503, by amending Sections 19504, 19506, 19510, and 19511, by amending Subsection 19513.04 of Section 19513, by adding Subsection 19513.08 to Section 19513, by amending Subsection 19541.0104 of Section 19541, by amending Section 19542, by amending Subsections 19543.08 and 19543.1010 of Section 19543, and to add Chapter 1 to Title XX of the Government Code, relative to the functions of the Director of Finance and the Commissioner of Revenue and Taxation, and for other purposes.

Be It Enacted by the People of the Territory of Guam:

Section 1. Section 19527 is hereby added to Chapter 6, Title XX, Government Code, as follows:

* * * * * * *

Section 19. Chapter 1 is hereby added to Title XX, Government Code to read as follows:

"Taxation

Chapter 1—General

Section 19000. Director of Finance. The administration and enforcement of this Title and the collection of all taxes provided by law shall be performed by or under the supervision of the Director of Finance, hereinafter referred to as the Director.

Section 19001. Commissioner of Taxation. There shall be in the Department of Finance a Commissioner of Revenue and Taxation who shall have such duties and powers as may be provided by law or prescribed by the Director.

* * * * * * *

Section 20. This is an urgency measure and shall take effect upon its approval by the Governor.

* * * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 57 Introduced by.....
Committee on Finance and Taxation, by request

An Act to add Chapter 7 to Title XX of the Government Code of Guam, concerning the Guam Territorial Income Tax.

Be It Enacted by the People of the Territory of Guam:

Section 1. The following Chapter 7 is hereby added to Title XX of the Government Code of Guam as follows:

"Chapter 7
Guam Territorial Income Tax

Section 19600. Designation. The territorial income tax provided by Section 31 of the Organic Act of Guam (Public Law 630, Chapter 512, 81st Congress) is hereby designated the Guam Territorial Income Tax.

Section 19600.1. Authority of Department of Finance.

(a) Except as otherwise expressly provided by law, the administration and enforcement of the Guam Territorial Income Tax shall be performed by or under the supervision of the Director of Finance, herein referred to as the Director.

* * * * * * *

(a) The term "Secretary" or "Secretary of the Treasury" shall mean the Director of Finance of the government of Guam.

(b) The term "Secretary or his delegate" shall mean the Director of Finance of the government of Guam . . .

* * * * * * *

Section 19600.4. Rules and Regulations. The Director, or his delegate, shall have authority to prescribe all needful rules and regulations necessary to adapt and apply as the Guam Territorial Income Tax the income tax laws of the United States. . . .

* * * * * * *

Section 19600.5. Compromises. The Director or his delegate may compromise any civil or criminal case arising under the Guam Territorial Income. . . .

* * * * * * *

(f) Tax Court. The District Court of Guam shall have the same jurisdiction with respect to the Guam Territorial Income Tax as the United States Tax Court has with respect to the United States Income

tax under the United States Internal Revenue Code of 1939, as amended. . . .

* * * * * * *

. . . The District Court of Guam shall implement this Section as may be necessary by rules of procedure.

* * * * * * *

Section 2. This Act is an urgency measure and shall take effect upon the approval of the Governor.

* * * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 78 Introduced by.....
Committee on Finance and Taxation, by request

An Act to add Chapter 8 to Title XX, Government Code of Guam, to require the filing of copies of United States income tax returns under certain conditions, and for other purposes.

* * * * * * *

Section 2. This Act is an urgency measure and shall take effect upon its approval by the Governor.

* * * * * * *